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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

In re E.H., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

E.H.,

Defendant and Appellant.

A147108

(Solano County
Super. Ct. No. J42435)

STATEMENT OF THE CASE

On December 19, 2012, a petition was filed in the Superior Court of Los Angeles County pursuant to Welfare and Institutions Code¹ section 602, alleging two counts of felony vandalism over \$400 damage (Pen. Code, § 594, subd. (a)), and one count of misdemeanor vandalism under \$400 damage (Pen. Code, §594, subd. (a)). Each incident involved graffiti. On November 5, 2013, appellant admitted one felony count of vandalism with the other counts dismissed. On the same day, the court declared the minor a ward of the court and placed him on probation with his paternal grandmother in the City of Palmdale. The amount of restitution due to the City of Palmdale as victim was stipulated by counsel to be \$1,343.22.

¹ Unless otherwise stated, all statutory references are to the Welfare and Institutions Code.

On January 24, 2014, appellant requested he be allowed to move to live with his mother, stepfather, and siblings in Fairfield. The case was transferred to Solano County on March 13, 2014. The juvenile court in Solano County issued an order continuing the restitution obligation on May 19, 2014.

In July 2014, appellant was arrested for a misdemeanor violation of Penal Code section 148, subdivision (a)(1). On May 18, 2015, the minor admitted to a probation violation with the pending misdemeanor count dismissed. On June 3, 2015, appellant was ordered to live with his father in Los Angeles in anticipation of the disposition of the case. All probation orders remained in effect.

A progress report was prepared by juvenile probation and presented to the juvenile court in Solano County on August 3, 2015. The probation officer submitted evidence appellant was generally satisfying the terms of probation. He graduated from high school and while on probation had sustained only the arrest for the Penal Code section 148 violation identified above. He completed 40 hours of community service out of the 80 hours imposed. The officer asked for a two-month extension of probation to allow appellant to finish community service and make some payments towards restitution.

Two months later, the defense counsel asked the court to terminate probation as successful. Appellant had completed his community service hours. He still had not paid his restitution. Probation argued supervision should be terminated unsuccessfully because appellant had not made any payments on restitution. The court concluded it would give the minor additional time to make restitution. If no restitution was paid by December 1, 2015, the probation would terminate as unsuccessful.

On December 1, 2015, minor's counsel asked the court to convert the restitution order to a civil judgment and terminate the probation as successful. All other conditions of probation had been satisfied. The trial court did convert the restitution to a civil judgment, but terminated the probation as unsuccessful because of the failure to pay restitution. The court did indicate it would modify the order to successful termination of

probation if appellant paid the restitution. On December 15, 2015, appellant filed his notice of appeal.

While appellant was on probation for a total of 25 months, he graduated from Armijo High School. His community service hours consisted of participating in the Leadership Enrichment and Arts Program. There, appellant engaged in academic tutoring, provided assistance in the sports program, and other activities. His drug tests were all negative. After moving to Los Angeles to be with his father, appellant attempted to enroll in Antelope Valley Community College in the fall of 2015, but could not due to the lack of financial support. By the same token, he was not able to make restitution.

When the parties appeared in court on December 1, 2015, appellant was 19 years old. The court indicated it was reluctant to terminate probation as successful because appellant continued to make no restitution payments. The court indicated it could have terminated the probation as unsuccessful when the issue was first discussed in October 2015. However, the court continued the matter so appellant could make some effort at satisfying his obligation. While living in Los Angeles, the minor was purportedly working with his father as a trucker. Other than the comments by minor on this subject, there was no documentary evidence presented to the court by probation to indicate wages or like information on the matter. At the end, the court indicated, "If he was suddenly to come back and say, hey, I'm going to pay this or that or the other thing, you could always ask for a nunc pro tunc change in the order This doesn't bar him from petitioning later on, Hey, I paid my restitution; ask for a sealing order."

It is important to note that at all times appellant was represented by appointed counsel because of his minor status and indigency. Also, at no time were either of appellant's parents called upon to make any contribution for the restitution obligation of their son.

DISCUSSION

Appellant contends the trial court abused its discretion when it terminated the appellant's probation as unsuccessful. He contends the court improperly relied on the failure of the minor to make restitution, instead of considering all the other features of his performance while on probation. On the issue of restitution, appellant contended he could not make the payments due to financial hardship. He now claims the court did not give proper weight to this factor.

The standard of review in this matter is abuse of discretion. (*In re Gina S.* (2005) 133 Cal.App.4th 1074, 1082.) A trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it. (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377.)

In his discussion, appellant focuses on *In re Timothy N.* (2013) 216 Cal.App.4th 725 (*Timothy N.*). In that case, the minor was ordered to make restitution in the sum of \$21,113. (*Id.* at p. 729.) After two years on probation, he had paid \$1,380. His probation was terminated as successful after completing all other probation conditions. (*Id.* at p. 730.) The issue in *Timothy N.* was not the termination of probation, but whether the plea bargain reducing the offense from a felony to a misdemeanor would apply if probation was completed successfully. (*Id.* at p. 733.) Even though restitution was still outstanding, the trial court found the minor had completed probation with success based on his ruling. Hence, the trial court abused his discretion when the felony was not reduced to a misdemeanor per the bargain. (*Id.* at p. 736.)

In *Timothy N.*, the trial court found the minor's failure to complete restitution was due to financial circumstances beyond his control. "In the absence of evidence that Timothy's failure to pay more restitution was willful or that he failed to make a bona fide effort to pay, the trial court could not have revoked his probation based on the failure to pay restitution. The court's only options were to extend the probation period or to terminate probation. The trial court chose to terminate Timothy's probation. This

termination was necessarily successful; Timothy fulfilled all of the other terms of probation, and the court could not have revoked his probation based on his failure to fulfill the restitution condition.” (*Timothy N., supra*, 216 Cal.App.4th at p. 736.)

Here, the court converted the restitution obligation to a civil judgment. Restitution did not go away. In all other regards the minor was a success on probation. His 80 community service hours amounted to uncompensated work at his school that benefited others besides appellant. The court here gave no financial value to this free community service by appellant. It could be argued satisfying the community service obligation well exceeded the restitution sum of \$50–\$100, which the court indicated would satisfy a reasonable sum for addressing the restitution order.

Appellant, in all ways except paying restitution, satisfied his conditions of probation. He now has a civil judgment for the full amount owed after he engaged in marking property of the City of Palmdale. If the city desires to collect, they have a facile procedure to do so, and appellant is now an adult. We also observe the indicated community service to a local public school without any compensation has relevance on the issue of paying back to society for juvenile behavior.

Regarding the issue of terminating appellant’s probation as successful or unsuccessful, we are aware of the considerable discretion trial courts enjoy in this regard. In this record, there is a paucity of evidence indicating appellant was financially able to make payments himself. Furthermore, there is no evidence his parents made any contribution to their son’s obligation. We do know appellant could not start his junior college program due to financial hardship. We conclude, on remand, the trial court should address the issue of ability to pay before concluding probation should be terminated unsuccessfully due to this minor’s failure to make restitution payments. In all other respects, appellant was compliant with probation conditions.

Appellant also asks this court to remand the matter so appellant’s juvenile records may be sealed in accordance with the mandates of section 786. This issue was not

presented to the juvenile court at the first instance. It was not raised below. It is being presented by appellant for the first time on appeal. Because the juvenile court did not rule on this request, there is no order for review before us. We will not consider what was not originally presented to the trial court. We therefore defer to the juvenile court on this issue in the first instance.

CONCLUSION

Having reviewed the record in this case, we conclude the trial court needed to review whether the appellant had the ability to make restitution payments before the court decided to terminate probation as unsuccessful because of his failure to make payments. Included in the calculation should be the consequences of the civil judgment appellant agreed to assume towards the City of Palmdale and the value of his satisfying the community service obligation. Also regarding the sealing issue under section 786, we believe the matter needs to be presented on remand to the trial court initially.

DISPOSITION

The order of the juvenile court terminating appellant's probation as unsuccessful is reversed. The matter is remanded to the trial court for consideration of appellant's ability to pay in light of his community service contribution and the civil judgment.

DONDERO, J.

We concur:

HUMES, P. J.

MARGULIES, J.